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No. 10-1105

Supreme Court, U.S.
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In the

Supreme Court of the United States

JOSEPH KEEFE, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON A PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SUPPLEMENT TO PETITION FOR WRITS OF CERTIORARI

Sallie W. Gladney,
Counsel of Record
Thomas E. Redding,
Teresa J. Womack,
Redding & Associates, P.C.
2914 West T.C. Jester
Houston, TX 77018
(713) 965-9244
Attorneys for Petitioners

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INTRODUCTION

Pursuant to Supreme Court Rule 15.8, petitioners supplement their petition for writs of certiorari to bring to the Court's attention two issues.

First, the Tenth Circuit's subsequent opinion in *Springer*[1] holding that the factors recently established by this Court in *Henderson*[2] (to determine the jurisdictional consequences of a provision within a complex procedural framework) apply to tax provisions in disputes before the Tax Court.

Second, the government's representations to multiple courts – both before and after this Court remanded *Mann*[3] and the Tenth Circuit

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[1] *Springer v. Commissioner*, 2011 WL 899718 (10th Cir. March 14, 2011) (unpublished). SApp:1-6. "SApp:X refers to p. "X" of the Supplemental Appendix attached to this supplement.

[2] *Henderson v. Shinseki*, 562 U.S.—, 131 S.Ct. 1197, —L.Ed.2d—, 2011 WL 691592 (2011). App:96-112. "App:X" refers to p. "X" of the Appendix to the Petition for Writs of Certiorari.

[3] *Mann v. United States*, –U.S.—, —S.Ct.—, 2011 WL 767550 (2011), remanding *United States v.*

issued *Springer* – that this Court's *Henderson* analysis is strictly limited to veterans cases and does not apply to other legal issues or "ordinary civil litigation," such as tax cases.

SUPPLEMENT

In recent years this Court has repeatedly admonished courts for making what it calls "drive-by jurisdictional rulings,"[4] *i.e.*, stating a claim or suit is being dismissed for "lack of jurisdiction" when it is actually resolved on nonjurisdictional grounds. The most common nonjurisdictional grounds conflated with "lack of jurisdiction" are

- when jurisdictional consequences are erroneously given to a provision that is

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Mann, 373 Fed.Appx. 350, 2010 WL 1418308 (4th Cir. 2010) (unpublished), a federal sentencing guideline case, for reconsideration pursuant to *Henderson*. SApp:7.

[4] *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 91, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

actually a claim-processing rule,[5]

- when a party cannot meet its burden to prove a necessary element of its cause of action,[6] and
- when courts convert merits into jurisdiction and then exercise "hypothetical jurisdiction" to decide those merits.[7]

This Court has made clear that the need for precision in the language of jurisdiction is not limited to selected areas of the law, and while "jurisdiction" broadly refers to "a court's adjudicatory authority," properly applied, it refers only to subject-matter and personal jurisdiction.[8] Until recently this issue had only been addressed in the context of Article III

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[5] *Reed Elsevier, Inc. v. Muchnick*, – U.S. –, 130 S.Ct. 1237, 1243-4, 176 L.Ed.2d17 (2010), *citing Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16, 126 S.Ct. 1235, 163 L.Ed.2d 1097(2006) and *Steel Co.*, 523 U.S. at 91.

[6] *Arbaugh*, 546 U.S., at 511.

[7] *Steel Co.*, 523 U.S., at 93-4.

[8] *Reed Elsevier, Inc.*, 130 S.Ct., at 1243.

courts. On March 1, 2011, this Court issued *Henderson*, extending its prohibition against conflating jurisdictional and nonjurisdictional provisions to Article I tribunals.[9]

At issue in *Henderson* was whether 38 U.S.C. §7266(a), which allows veterans 120 days to appeal to the United States Court of Veterans Claims, had "jurisdictional consequences" within the administrative framework of the Veterans' Judicial Review Act or whether it was merely a "claim-processing rule" that could be waived under equitable principles.[10] This Court articulated four factors that courts must apply to determine the jurisdictional consequences of a provision within a complex administrative/procedural framework.[11]

At issue in this petition for writs of certiorari are

- the jurisdictional consequences of 26 U.S.C. §6226(d)(1)(B) within TEFRA's

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[9] *Henderson*, 131 S.Ct., at 1204. App:98, 106-07.

[10] *Henderson*, 131 S.Ct., at 1202. App:103.

[11] *Henderson*, 131 S.Ct., at 1204-6. App:107-112.

complex procedural framework for pre-1997 tax years,[12] and

- whether the Federal Circuit conflated §6221 and §7422(h) to improperly render "drive-by jurisdictional rulings" and "hypothetical judgments."[13]

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[12] That is, §6226(d)(1)(B) bars partners with expired assessment deadlines from participating in partnership-level Tax Court suits. App:123. Consequently, the relevant petitioners here could not have raised their §6501(a)-based limitations claims in the partnership-level Tax Court suits. And, under TEFRA'S affected items provisions, §7422(h) cannot bar the exercise of the Court of Federal Claims' 28 U.S.C. §§1340, 1346(a)(1), and 1491(a)(1) general refund jurisdiction to now address their §6501(a)-based affected-item limitations claims.

[13] In other words, §6221 requires partnership items to be resolved at the partnership-level, unless excepted, and, for pre-1997 tax years, Congress granted courts jurisdiction in partnership-level suits only to determine partnership items. §6226(f). App:125; SApp:8. Consequently, partnership-item elements of affected items are determined first, usually in partnership-level suits, and are thereafter conclusive as to all bound partners. But the affected item itself can be determined only in later partner-level proceedings where the previously determined

Both issues are directly impacted by *Henderson*. The combined petition for writs of certiorari in these cases was due and was filed one week after *Henderson* was issued. Petitioners requested that certiorari be granted for this Court to (i) apply the *Henderson* factors to determine the jurisdictional consequences of §6226(d)(1)(B)[14] for pre-1997 tax years to their limitations claims, and (ii) apply *Henderson* as well as *Arbaugh* and *Steel* to reverse the Federal Circuit's "drive-by jurisdictional rulings" and "hypothetical judgments" as to their limitations and penalty interest claims. Pet:i,11-12. Petitioners requested that after the lower court's jurisdiction is established for both types of claims, that these cases then be

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partnership-item elements are applied. *Jade Trading, LLC v. United States*, 598 F.3d 1372, 1378-80 (Fed.Cir. 2010). To reinforce this jurisdictional bifurcation, §7422(h) bars the exercise of existing partner-level jurisdiction if "a refund [is] attributable to partnership items (as defined in §6231(a)(3)) . . . ." App:131. But §7422(h) does not bar (or even mention) refunds attributable to affected items (as defined in §6231(a)(5)).

[14] Unless otherwise indicated, all references to "§" or "section" are to the tax code at 26 U.S.C.

remanded for determination of their merits. Pet:12.

The threshold question here is whether *Henderson* is limited to only veterans cases or whether it broadly applies to determine the jurisdictional consequences of any provision within any complex administrative/ procedural framework, including tax provisions within TEFRA's complex procedural framework for pre-1997 tax years.

On March 7, 2011, after the original petition was sent for binding, this Court granted certiorari in *Mann*[15] and remanded with instructions that the Fourth Circuit review its jurisdictional analysis in that criminal case "in light of *Henderson*." SApp:7. Clearly, this Court did not interpret *Henderson* as restricted only to veterans cases.

On March 14, 2011, the Tenth Circuit recognized that this Court's *Henderson* analysis also applies to tax provisions. Specifically, the Tenth Circuit stated:

> Like the Veterans Court, the Tax Court is also an Article I court. However,

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[15] *Mann*, 2011 WL 767550. SApp:7.

> the Congressional scheme defining the Tax Court's jurisdiction is significantly different from "the unique administrative scheme" for veterans-benefit review and the Veterans Court's place in it, as described in *Henderson*. *See Henderson*, 2011 WL 691592, at * 7. Most significantly, the terms of 26 U.S.C. §6330(d)(1) clearly refer to the Tax Court's jurisdiction. *Cf. Henderson*, 2011 WL 691592, at * 8 (noting first, among several factors, that statute allowing Veterans Court's review of benefits decision "do[es] not suggest, much less provide clear evidence, that the provision was meant to carry jurisdictional consequences"). Under the Supreme Court's analysis in *Henderson*, the requirements for an appeal to the Tax Court under 26 U.S.C. §6330(d)(1) are jurisdictional.

But this Court's remand of *Mann* and the Tenth Circuit's unpublished opinion in *Springer* have not deterred the government from representing to other courts in related pending tax cases that *Henderson* is strictly limited to veterans cases and that it cannot apply to tax provisions in suits before the Tax

Court. SApp:14, 19-20, 26-27, 29-30, 44-46. For example, the §6501(a)-based limitations claim for tax year 1984 that is currently before the Fifth Circuit in *Scott v. United States*[16] is similar to the limitations claims here. There, briefing is concluded and oral argument is set for April 27, 2011. Appellants in *Scott* notified the Fifth Circuit of this Court's intervening holdings in *Henderson* and, within the restrictions of Fed.R.App.P. 28(j), briefly explained how those holdings apply to resolve the jurisdictional consequences of pre-1997 §6226(d)(1)(B) and the jurisdictional conflation of §6221 and §7422(h). SApp:9-12. The government's response to the Fifth Circuit was that

> We are at a complete loss to see how the *Henderson* opinion, regarding a time limit on appeal of veterans' benefit rulings, has any relevance whatsoever to the case at bar involving the statute of limitations on assessment of federal income tax arising from the appellant's

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[16] *Scott, et al. v. United States* (Fifth Circuit 10-20425), appealed *sub nom.* from *Matthews v. United States*, 2010 WL 2305750 (S.D.Tex. 2010) (unpublished).

investment in a TEFRA partnership. . . .

> *Henderson*'s analysis in the context of veterans benefits simply has no bearing on the issues presented in the case at bar, and appellant is grasping at straws in citing it to the Court.

SApp:14.

The *Scott* appellants also called the Fifth Circuit's attention to *Mann* and *Springer*. SApp:16-18, 22-24. The government responded that *Mann* did not indicate that this Court's *Henderson* analysis is relevant to jurisdictional determinations in tax cases because "[l]ike *Henderson*, *Mann* involved a factual scenario and statutory scheme entirely distinct from that presented here." SApp:19-20. In *Scott*, the government has not yet responded to the appellants' notice regarding *Springer*.

Other limitations and penalty interest claims similar to the petitioners' are currently before multiple federal district courts and the Court of Federal Claims. Where dispositive motions are pending, those taxpayers have also notified those courts of *Henderson*, *Mann*, and *Springer*. The government's response to those courts is that *Henderson* recognized a clear line

of demarcation between veterans benefit claims and "ordinary civil litigation" and, because *Henderson* involved the "unique nature of the veterans' benefits claims system," this Court's *Henderson* analysis does not apply to "'ordinary civil litigation' cases" such as tax refund suits. SApp:26-27.

In cases currently pending before the Court of Federal Claims, the government has used status reports and other filings to request that the court *sua sponte* dismiss the taxpayers' claims without requiring that the government file proper motions. SApp:30. After those taxpayers notified the Court of Federal Claims of the implications of this Court's *Henderson* analysis, the government responded that the application of *Henderson* to those tax refund cases is "outlandish and provides no justification for continuing this litigation." SApp:29.

The government has gone so far as to threaten those taxpayers' attorneys with sanctions if they continue to assert that this Court's jurisdictional analysis in *Henderson* applies to tax refund claims:

> Because there is no basis for further litigation, any continued maintenance of

> period of limitation and tax motivated interest claims in the face of the Federal Circuit's decisions in *Keener* and *Prati* will prompt a motion by defendant for all sanctions permitted by law, including sanctions under RCFC 11(b)(2), (c) (for pressing unwarranted and frivolous legal claims) and payment by plaintiffs' counsel of excess costs, expenses, and attorneys' fees under 28 U.S.C. §1927.

SApp:44-45.

CONCLUSION

Prior to *Henderson*, this Court made it clear that "jurisdiction" refers to "a court's adjudicatory authority" and that its prohibition against "drive-by jurisdictional rulings" and "hypothetical judgments" by Article III courts should be broadly applied. Counsel can find no case in which this Court held that this prohibition did *not* apply to a particular court or area of law.

Certiorari should be granted in these cases to make clear that *Henderson*'s extension of the prohibition against "drive-by jurisdictional rulings" and "hypothetical jurisdiction" to

Article I tribunals and its four-factor test for jurisdictional relevance apply equally broadly to "ordinary civil litigation," including tax cases before the Article I Tax Court and Court of Federal Claims. In fact, this Court indicated in *Henderson* that its prohibition should be applied with even more force to matters before Article I tribunals due to the circumscribed nature of the "unique administrative scheme[s]" Congress must expressly assign for their review. App:106-07.

In remanding *Mann*, this Court recognized that its *Henderson* analysis is not restricted to only veterans cases. The Tenth Circuit has recognized, *albeit* in an unpublished opinion, that *Henderson*'s jurisdictional analysis determines whether §6330(d)(1) has jurisdictional consequences in tax "collection due process" suits before the Tax Court. There is no logical reason why that same analysis would not control to determine the jurisdictional consequences of §6226(d)(1)(B) in partnership-level suits before the Tax Court for pre-1997 tax years. Further, because *Henderson*'s jurisdictional analysis applies to tax cases, courts may no longer conflate the jurisdictional consequences of §6221 and §7422(h) to render "drive-by jurisdictional

rulings" and "hypothetical judgments" in tax refund suits.

Finally, certiorari should be granted to forestall conflicting opinions as to whether *Henderson* applies to tax cases caused by the government's continuing, erroneous representations to the lower courts.

Respectfully submitted.

Sallie W. Gladney
Counsel of Record
Teresa J. Womack
Thomas E. Redding
Redding & Associates, P.C.
2914 West T.C. Jester
Houston, TX 77018
(713) 965-9244
Counsel for Petitioners

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UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

LINDSEY K. SPRINGER,

Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

FILED
United States Court of Appeals
for the Tenth Circuit
March 14, 2011
Elisabeth A. Shumaker
Clerk of Court

No. 10-9001
(Tax Ct. No. 3781-09L)

ORDER AND JUDGMENT *

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Before **HOLMES** and **McKAY**, Circuit Judges, **PORFILIO**, Senior Circuit Judge.

Petitioner Lindsey K. Springer appeals from an order of the Tax Court that dismissed, for lack of jurisdiction, his petition seeking a collection due process (CDP) hearing under 26 U.S.C. §6320 to challenge the validity of a notice of federal tax lien for tax years 1990-1996. Finding no error, we affirm.

The Tax Court's decision sets out the procedural history in full, and we repeat only the most salient facts here. By at least 1996, the IRS began its attempts to collect unpaid taxes for tax years 1990-1996 from Mr. Springer. Extensive proceedings have been held, including, but not limited to, a CDP hearing, a Tax Court proceeding, and an appeal to this court, which were all resolved in the Commissioner's favor. *See Springer v. Comm'r*, 580 F.3d 1142, 1144 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1907 (2010). In August 2008, the IRS mailed another notice of federal tax lien for tax years 1990-1996 to Mr. Springer. In September 2008, Mr. Springer made another request to the IRS's Office of Appeals for a CDP hearing for tax years 1990-1996, which was denied as untimely. Because no hearing was held, the Office of Appeals did not issue a notice of determination under 26 U.S.C. §§6320(c) and 6330.

Mr. Springer then filed his petition in the Tax Court, which dismissed because no notice of determination had been issued to support its exercise of jurisdiction, as required by §6330(d)(1). Mr. Springer appeals.

We review the Tax Court's factual findings for clear error, but we review its legal conclusions de novo. *Estate of Holl v. Comm'r*, 967 F.2d 1437, 1438 (10th Cir. 1992). Whether the Tax Court correctly dismissed a petition for lack of jurisdiction is a mixed question of law and fact. *Anderson v. Comm'r*, 62 F.3d 1266, 1270 (10th Cir. 1995).

Mr. Springer frames the following four issues in his opening brief on appeal: (1) whether the Tax Court had jurisdiction over his petition; (2) that the Secretary of the Treasury had no lien as a matter of law; (3) that he never received any notice under 26 U.S.C. § 6320; and (4) that the certificate of release of federal tax lien is the final word. But although Mr. Springer frames one of his issues in terms of the Tax Court's jurisdiction, he does not actually present any argument or authority in his opening brief showing that the Tax Court had jurisdiction over his petition.

"'The Tax Court is a court of limited jurisdiction.'" *Richards v. Comm'r*, 37 F.3d 587, 588 n.4 (10th Cir. 1994) (quoting *Comm'r v. McCoy*, 484 U.S. 3, 7 (1987)). When a taxpayer seeks a hearing under 26 U.S.C. § 6320(b) to challenge a

tax lien, the provisions of § 6330(c), (d) (except for (d)(2)(B)), (e), and (g) apply. § 6320(c). Section 6330(d)(1) provides for "[j]udicial review of [the notice of] determination[,]" stating that "[t]he person may, within 30 days of a determination under this section, appeal such determination to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter)." § 6330(d)(1). The Tax Court's jurisdiction therefore "'is dependent on the issuance of a valid notice of determination and a timely petition for review.'" *Boyd v. Comm'r*, 451 F.3d 8, 11 (1st Cir. 2006) (quoting *Offiler v. Comm'r*, 114 T.C. 492, 498 (2000)).[1]

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[1] The Supreme Court recently held that the statutory 120-day deadline on filing appeals to the United States Court of Veterans Claims (Veterans Court) is not jurisdictional, but is, rather, a claim-processing rule that may be subject to equitable exceptions. *Henderson ex rel. Henderson v. Shinseki*, No. 09-1036, 2011 WL 691592, at *4-*10 (U.S. Mar. 1, 2011). The Court concluded that *Bowles v. Russell*, 551 U.S. 205 (2007), "did not hold categorically that every deadline for seeking judicial review in civil litigation is jurisdictional" and that the reasoning of that decision does not compel "a categorical rule regarding review of administrative decisions[.]" *Henderson*, 2011 WL 691592, at *6, *7.

Like the Veterans Court, the Tax Court is also an Article I court. However, the Congressional scheme defining the Tax Court's jurisdiction is significantly different from "the unique administrative scheme" for veterans-benefit review and the Veterans Court's place in it, as described in

Mr. Springer does not dispute that his September 2008 request for a CDP hearing was denied and that no notice of determination was issued. Instead, he argues that the IRS did not mail the August 2008 notice of federal tax lien to his "last known address," relying on three cases in which the issue was whether the IRS mailed a notice to the taxpayer's "last known address." These cases are inapposite, however, because none of them addressed the jurisdictional issue presented in this appeal. *See Armstrong v. Comm'r*, 15 F.3d 970, 973-76 (10th Cir. 1994) (affirming Tax Court's dismissal of taxpayer's petition as untimely because time to file petition ran from mailing of the notice of deficiency and taxpayer failed to show that the Tax Court's determination that the address the IRS had used as his last known address for mailing the notice of deficiency was clearly erroneous or that the IRS failed to exercise reasonable diligence in determining taxpayer's last

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Henderson. *See Henderson*, 2011 WL 691592, at *7. Most significantly, the terms of 26 U.S.C. §6330(d)(1) clearly refer to the Tax Court's jurisdiction. *Cf. Henderson*, 2011 WL 691592, at *8 (noting first, among several factors, that statute allowing Veterans Court's review of benefits decision "do[es] not suggest, much less provide clear evidence, that the provision was meant to carry jurisdictional consequences"). Under the Supreme Court's analysis in *Henderson*, the requirements for an appeal to the Tax Court under 26 U.S.C. §6330(d)(1) are jurisdictional.

known address); *Cyclone Drilling, Inc. v. Kelley*, 769 F.2d 662, 663-66 (10th Cir. 1985) (reversing grant of summary judgment to IRS in action for injunctive relief by taxpayer and remanding to district court because there was a genuine issue of material fact as to whether the IRS sent a notice of deficiency to his last known address); *Benson v. United States*, No. CIV. 99-0056 LH/KBM, 2000 WL 506784, at *2-*3 (D. N.M. Mar. 20, 2000) (granting IRS's motion to dismiss and/or for summary judgment in taxpayer's federal action seeking injunctive relief against tax collection because taxpayer failed to produce evidence that she provided clear and concise notice of a different address than the IRS used to mail the notice of deficiency). We find no error in the Tax Court's decision to dismiss Mr. Springer's petition based on the absence of a valid notice of determination.

It is unnecessary to address Mr. Springer's other arguments, none of which go to the Tax Court's jurisdiction.

AFFIRMED.

Entered for the Court

Jerome A. Holmes
Circuit Judge

Supreme Court of the United States

(ORDER LIST: 562 U.S.)

MONDAY, MARCH 7, 2011

CERTIORARI — SUMMARY DISPOSITIONS

. . . .

10–5860 MANN V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Henderson v. Shinseki*, 562 U.S. —— (2011).

. . . .

INTERNAL REVENUE CODE (26 U.S.C.)

[Effective for Tax Years 1984-1986]

SEC. 6221. TAX TREATMENT DETERMINED AT PARTNERSHIP LEVEL

Except as otherwise provided in this subsection, the tax treatment of any partnership item shall be determined at the partnership level.

Case: 10-20425 Document: 00511407158 Page:1 Date Filed: 03/10/2011

REDDING & ASSOCIATES, P.C.
Attorneys at Law
2914 West T.C. Jester
Houston, Texas 77018-7010
Telephone: (713) 965-9244 • Telecopier: (713) 621-5227

Thomas E. Redding, J.D. Teresa J. Womack, J.D.
Sallie W. Gladney, J.D.

March 10, 2011

Lyle W. Cayce, Clerk
United States Court of Appeals
for the Fifth Circuit
600 S. Maestri Place, Room 102
New Orleans, LA 70130

Re: *Sharon Scott, Ind. Executrix of the Est. of Edward O. Matthews, et al. v. United States of America*; Docket No. 10-20425

Dear Mr. Cayce:

This case is tentatively calendared for oral argument for the week of April 25, 2011.

I write pursuant to Fed. R. App. P. 28(j), to inform the Court that on March 1, 2011, the Supreme Court issued *Henderson v. Shinseki*, 2011 WL 691592 (U.S.), unanimously reversing and remanding 589 F.3d 1201 (Fed.Cir. 2009) (*en banc*), copy attached. *Henderson* (i) extends the Supreme Court's general analysis in *Arbaugh*[1] (addressing

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[1] *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006).

Article III courts) to Article I courts, and then (ii) articulates four factors courts must apply to determine whether a provision within a complex procedural framework has "jurisdictional consequences" or is merely a "claim-processing rule" that courts may equitably ignore. *Henderson* directly applies to two of the fundamental issues presented here.

First, it applies to whether 26 U.S.C. §6226(d)(1)(B) is jurisdictional in TEFRA partnership-level Tax Court suits for pre-1997 tax years. (See pp. 29-30, 46-53 of Appellant's Opening Brief and pp.1, 17-23, 29-30 of Appellant's Reply Brief). Under the *Henderson* factors, it is; therefore, because his assessment deadline expired before the partnership-level Tax Court suit was filed, Matthews could never have participated there to raise his limitations defense to assessment.

Second, *Henderson* applies to the effect of conflating

(i) §7422(h) (no jurisdiction over the claim if refund is attributable to partnership items) and

(ii) §6221 (no jurisdiction over the merits of partnership-item elements if refund is attributable to affected items)

by both

(a) the district court below (Article III court), and

(b) the Court of Federal Claims (Article I court) and the Federal Circuit in *Keener* and *Prati*.[2]

(See pp. 14,20-21, and 45 of Appellant's Opening Brief and pp.9-12 of Appellant's Reply Brief). *Arbaugh* held "such unrefined dispositions [are] 'drive-by jurisdictional rulings' that [are] accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit."[3] *Arbaugh* relied on *Steel*, which also rejected such "hypothetical judgments."[4]

Because the nature of these issues, as applied to this partnership tax case, are so complex, on or before March 18, 2011, Appellants will file a motion for leave to file a supplemental brief and a proposed supplemental brief addressing these issues. Appellants do *not* believe that oral argument should be delayed, as there will be sufficient time for the government to respond and

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[2] *Keener v. U.S.*, 551 F.3d 1358 (Fed.Cir. 2009) and *Prati v. U.S.*, 603 F.3d 1301 (Fed.Cir. 2010).

[3] *Arbaugh*, 546 U.S. at 1242-43, quoting *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 91 (1998).

[4] *Steel*, 523 U.S. at 91.

for this Court to review these additional materials before April 25, 2011.

Very truly yours,
REDDING & ASSOCIATES, P.C.

/s/ Sallie W. Gladney
Sallie W. Gladney,
Attorney for Appellants

SWG:jr
Attachment

Case: 10-20425 Document: 00511408158 Page: 1 Date Filed: 03/11/2011

U.S. Department of Justice
Tax Division

Please reply to: Appellate Section

Facsimile No. (202) 514-8456 P.O. Box 502

Telephone No. (202) 514-3361 Washington, D.C. 20044

EPDelSole
5-74-13292
CMN 2001101347 March 11, 2011

Lyle W. Cayce, Esquire
Clerk, U.S. Court of Appeals
for the Fifth Circuit
600 S. Maestri Place, Room 102
New Orleans, LA 70130

Re: Sharon Scott, et al. v. United States
(5th Cir. - No. 10-20425)

Dear Mr. Cayce:

We are writing in response to the appellant's March 10, 2011 letter pursuant to Rule 28(j) in the above-listed appeal, calling the Court's attention the Supreme Court's March 1, 2011 decision in *Henderson v. Shinseki*, 2011 WL 691592. In *Henderson*, the Court held that a rule regarding the time for appealing an adverse administrative ruling regarding veterans' benefits to the Court of Appeals for Veterans Claims was not jurisdictional, because Congress did not make clear its intent that the time limit at issue should be jurisdictional.

We are at a complete loss to see how the *Henderson* opinion, regarding a time limit on appeal of veterans' benefit rulings, has any relevance whatsoever to the case at bar involving the statute of limitations on assessment of federal income tax arising from the appellant's investment in a TEFRA partnership. *Henderson* in no way disturbs the law applicable to the instant appeal, i.e. (1) that I.R.C. §§6501 and 6229 work in tandem to provide the time limit for assessing partnership items and (2) that refund claims attributable to partnership items (as is appellant's statute of limitations claim here) cannot be brought in the individual partners' refund suit, but instead must be determined in the partnership-level proceeding in the Tax Court. (See Answering Br. at 35-52.) Indeed, in contrast with the time limit at issue in *Henderson*, I.R.C. §7422(h) expressly deprives the district courts of jurisdiction over refund claims attributable to partnership items. Moreover, it was long clear as a matter of case law that there was jurisdiction for the Tax Court to hear statute-of-limitations challenges in partner-level proceedings, even before Congress reaffirmed that conclusion with an express statutory provision. (See Answering Br. at 60-63.)

Henderson's analysis in the context of veterans benefits simply has no bearing on the issues presented in the case at bar, and appellant is grasping at straws in citing it to the Court. Because of *Henderson*'s lack of relevance to the

instant case, the further briefing appellant suggests is not warranted, and any motion in that regard should be denied.

Sincerely yours,

/s/ ELLEN PAGE DELSOLE

ELLEN PAGE DELSOLE
Attorney
Appellate Section

Case: 10-20425 Document: 00511424826 Page: 1 Date Filed: 03/25/2011

REDDING & ASSOCIATES, P.C.
Attorneys at Law
2914 West T.C. Jester
Houston, Texas 77018-7010
Telephone: (713) 965-9244 • Telecopier: (713) 621-5227

Thomas E. Redding, J.D. Teresa J. Womack, J.D.
Sallie W. Gladney, J.D.

March 25, 2011

Lyle W. Cayce, Clerk
United States Court of Appeals
for the Fifth Circuit
600 S. Maestri Place, Room 102
New Orleans, LA 70130

Re: *Sharon Scott, Ind. Executrix of the Est. of Edward O. Matthews, et al. v. United States of America*; Docket No. 10-20425

Dear Mr. Cayce:

This case is calendared for oral argument on April 27, 2011. Pending is Appellants' motion for leave to file a supplemental brief addressing the application of the Supreme Court's recent holdings in *Henderson v. Shinseki*, 2011 WL 691592 (U.S.). The United States objects, asserting that *Henderson* is restricted to "the unique system for review of veterans' benefits claims by the Veterans Court" and is, therefore, irrelevant to the jurisdictional issues presented in "ordinary"

litigation such as this tax refund suit. (Document 00511420317, p. 2). The United States neglects to inform this Court that the Supreme Court disagrees.

I write pursuant to Fed.R.App.P. 28(j), to inform the Court that on March 7, 2011, the Supreme Court remanded *U.S. v. Mann*, 373 Fed.Appx. 350, 2010 WL 1418308 (4th Cir. 2010) (copy attached), a criminal case, to the Fourth Circuit "for further consideration in light of *Henderson* . . . ." See the attached excerpt from the Supreme Court's order.

In *Henderson* the Supreme Court articulated four factors courts must apply to determine whether a statute is jurisdictional or nonjurisdictional within a complex procedural framework. *Henderson* concerned the jurisdictional consequences of 38 U.S.C. §7266(a) within the procedural framework of the Veterans' Judicial Review Act for the resolution of veterans' claims. *Henderson*, slip op. at 2. *Mann* concerned the jurisdictional consequences of 18 U.S.C. §3582(c)(2) within the procedural framework of the United States Sentencing Guidelines for criminal cases. *Mann*, at 2. The Supreme Court has made clear that the *Henderson* requirements apply to determine the jurisdictional consequences of *any* statute within *any* complex procedural framework. The *Henderson* requirements, therefore, apply to the jurisdictional consequences of both (i) 26 U.S.C. §6226(d)(1)(B), and (ii) the conflation of §6221 and

§7422(h), within TEFRA's procedural framework to resolve partnership-related tax issues for pre-1997 tax years, which are at the heart of this case.

Therefore, Appellants request that their supplemental brief addressing the application of *Henderson* be filed and that the United States, as it has requested, be granted two weeks to file its response. (Document 00511420317, p. 6). Appellants do not believe any delay in oral argument will be necessary.

Very truly yours,

REDDING & ASSOCIATES, P.C.

/s/ Sallie W. Gladney
Sallie W. Gladney,
Attorney for Appellants

SWG:jr
Attachment

Case: 10-20425 Document: 00511428056 Page:1 Date Filed: 03/29/2011

U.S. Department of Justice
Tax Division

Please reply to: Appellate Section
Facsimile No. (202) 514-8456 P.O. Box 502
Telephone No. (202) 514-3361 Washington, D.C. 20044

EPDelSole
5-74-13292
CMN 2001101347 March 29, 2011

Lyle W. Cayce, Esquire
Clerk, U.S. Court of Appeals
for the Fifth Circuit
600 S. Maestri Place, Room 102
New Orleans, LA 70130

Re: Sharon Scott, et al. v. United States
(5th Cir. - No. 10-20425)

Dear Mr. Cayce:

We are responding to appellant's letter of March 25, 2011, in the above listed appeal, regarding the Supreme Court's order vacating and remanding the unpublished decision in *United States v. Mann*, 373 Fed. Appx. 350 (4th Cir. 2010), for further consideration in light of *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011). Like *Henderson*, *Mann* involved a factual scenario and statutory scheme entirely distinct from that presented here. In *Mann*, the district court denied a criminal defendant's motion for reduction of sentence under 18 U.S.C. 2011 §3582(c) and his motion to amend that order. The

Fourth Circuit, raising jurisdiction on its own, determined that, under §3582(c), the district court lacked jurisdiction to reconsider the earlier request for sentence reduction. In ordering further consideration in light of *Henderson*, it appears that the Supreme Court views *Mann* as similarly presenting a question whether a statute that is not clearly jurisdictional should nevertheless be construed as imposing a jurisdictional rule.

Here, the Government has asserted that I.R.C. §7422(h) imposes a jurisdictional bar based on opinions of this Court and other appellate courts that directly address the statute at issue. (See Answering Br. 38-48.) Moreover, §7422(h) clearly expresses Congress's intent to restrict jurisdiction and is placed in a section that generally defines the scope of district courts' jurisdiction in tax refund suits. It is therefore unnecessary here to turn to the analysis conducted in an entirely different context to evaluate whether § 7422(h) imposes jurisdictional limits. But even if this Court were to determine that *Henderson*'s analysis were relevant here by analogy, *Henderson* -- which considered whether there was a case-law history of treating the statute as jurisdictional, and whether Congress made its intent clear through the wording and placement of the provision within the statutory scheme (131 S. Ct. at 1203-05) -- supports the Government's argument here.

We also note that a typographical error has come to our attention in our letter of March 11, 2011 regarding Henderson. At the top of page 2 of that letter, the reference to "partner-level proceedings" should read "partnership-level proceedings."

Sincerely yours,

/s/ ELLEN PAGE DELSOLE

ELLEN PAGE DELSOLE
Attorney
Appellate Section

Case: 10-20425 Document: 00511429510 Page:1 Date Filed. 03/30/2011

REDDING & ASSOCIATES, P.C.
Attorneys at Law
2914 West T.C. Jester
Houston, Texas 77018-7010
Telephone: (713) 965-9244 • Telecopier: (713) 621-5227

Thomas E. Redding, J.D. Teresa J. Womack, J.D.
Sallie W. Gladney, J.D.

March 30, 2011

Lyle W. Cayce, Clerk
United States Court of Appeals
for the Fifth Circuit
600 S. Maestri Place, Room 102
New Orleans, LA 70130

Re: *Sharon Scott, Ind. Executrix of the Est. of Edward O. Matthews, et al. v. United States of America*; Docket No. 10-20425

Dear Mr. Cayce:

This case is calendared for oral argument on April 27, 2011. Appellants previously informed this Court that:

- On March 1, 2011, the Supreme Court issued *Henderson v. Shinseki*, 2011 WL 691592 (U.S.), articulating four factors courts must apply to determine whether a statute is jurisdictional or nonjurisdictional within a complex procedural framework (Document 00500407158); and

- On March 7, 2011, the Supreme Court remanded *U.S. v. Mann*, 373 Fed.Appx. 350, 2010 WL 1418308 (4th Cir. 2010), a criminal case, "for further consideration in light of *Henderson* . . .", evidencing that *Henderson* is not restricted to veterans cases, as alleged by the United States (Documents 00511420317, p. 2 and 00511424826).

I write now pursuant to Fed.R.App.P. 28(j) to inform the Court that on March 14, 2011, the Tenth Circuit issued *Springer v. Commissioner*, 2011 WL 899718 (10th Cir. 2011) (unpublished) (copy attached), holding that the Supreme Court's *Henderson* analysis applies to determine the jurisdictional consequences of tax statutes in Tax Court suits. *Springer*, slip op. p. 4 n. 1. While not precedential, the Tenth Circuit's reasoning is persuasive and supports the Appellants' argument here.

At issue in this appeal is whether Matthews was required to raise his §6501(a)-based limitations claim in the prior partnership-level Tax Court suit such that he is now barred from raising it in this partner-level refund suit. Under a *Henderson* analysis of TEFRA's procedural framework to resolve partnership-related tax issues for pre-1997 tax years:

- 26 U.S.C. §6226(d)(1)(B) is jurisdictional – just as the Tenth Circuit held that 26 U.S.C. §6330(d)(1) is jurisdictional – and,

therefore, pre-1997 §6226(d)(1)(B) barred partners with expired assessment deadlines, such as Matthews, from participating in and being bound by partnership-level Tax Court suits, regardless of whether their §6501(a)-based assessment deadline is classified as a partnership item or an affected item; and

While §7422(h) bars the exercise of existing refund jurisdiction if refunds are attributable to partnership items, the conflation of §§6221 and 7422(h) cannot bar exercise of that jurisdiction if refunds are attributable to affected items such as a partner's §6501(a)-based limitations period.

Very truly yours,

REDDING & ASSOCIATES, P.C.

/s/ Sallie W. Gladney
Sallie W. Gladney,
Attorney for Appellants

SWG:jr
Attachment

IN THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ALFONSO VARELA and SANDRA SANTA MARIA VARELA,	)	
Plaintiffs,	)	
v.	)	Civil No. 4:07-CV-343
UNITED STATES OF AMERICA,	)	
Defendant.	)	

UNITED STATES' RESPONSE
TO PLAINTIFF'S NOTICE
OF RECENT AUTHORITY

Defendant, United States of America, briefly responds to Plaintiff's [sic] Notice of Recent Authority (docket # 36) as follows.

In *Henderson v. Shinseki*, ___ U.S. ___, 131 S.Ct. 1197 (2011), the Supreme Court held that a rule regarding the time for appealing an adverse administrative ruling regarding veterans' benefits to the Court of Appeals for Veterans Claims was

not jurisdictional, because Congress did not make clear its intent that the time limit at issue should be jurisdictional.

Despite the fact that the Supreme Court recognized that there is a dramatic contrast between ordinary civil litigation and the system for adjudication of veterans' benefits claims, *id.* at 1205-06, and the fact that the Supreme Court clearly based its analysis of the jurisdictional issue there on the somewhat unique nature of the veterans' benefits claims system established by Congress, *see id.* at 1204-05, plaintiff appears to assert that *Henderson* has some applicability here, despite the fact that the present case is one of the "ordinary civil litigation" cases.

The Government is at a complete loss to see how the *Henderson* opinion has any relevance whatsoever to the case at bar involving the statute of limitations on assessment of federal income tax arising from the plaintiff's investment in a TEFRA partnership. Henderson in no way disturbs the law applicable to this case, i.e. (1) that 26 U.S.C. §§6501 and 6229 work in tandem to provide the time limit for assessing partnership items and (2) that refund claims attributable to partnership items (as is plaintiff's statute of limitations claim here) cannot be brought in the individual partners' refund suit, but instead must be determined in the partnership-level proceeding in the Tax Court. Indeed, in contrast with the time limit at issue in

Henderson, 26 U.S.C. §7422(h) expressly deprives this Court of jurisdiction over refund claims attributable to partnership items. Moreover, it was long clear as a matter of case law that there was jurisdiction for the Tax Court to hear statute-of-limitations challenges in partner-level proceedings, even before Congress reaffirmed that conclusion in 1997 with an express statutory provision.

Henderson's analysis in the context of veterans benefits simply has no bearing on the issues presented in the present case, and plaintiff is grasping at straws in citing it to the Court.

JOSÉ ANGEL MORENO
Acting United States Attorney

/s/ Michael D. Powell

MICHAEL D. POWELL
Bar No. 287121 - Florida
Trial Attorney, Tax Division
U.S. Department of Justice
717 N. Harwood, Suite 400
Dallas, Texas 75201
(214) 880-9757
(214) 880-9741 (fax)
michael.d.powell@usdoj.gov
ATTORNEY FOR UNITED STATES

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

No. 04-683 T

(Judge Marian Blank Horn)

(Consolidated with Nos. 05-695 T, 05-696 T, 05-1315 T, 05-1384 T, & 09-205 T)

JOHN E. KETTLE and ANNE R. KETTLE,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S RESPONSE TO PLAINTIFFS' NOTICE

This past Sunday plaintiffs (Kettles, Ivys, Weidemanns) filed a six-page document (doc. #65) titled "notice of recent authority." The document goes far beyond the ordinary understanding of the words "notice" or "recent authority" as it includes six pages of argument replete with citation to cases dating from 1998 to 2006. The justification for the notice, assert plaintiffs, is that a March 1 decision

of the Supreme Court about the deadline for a veteran to appeal a denial of federal benefits trumps the Federal Circuit's explicit rejection of plaintiffs' untimely assessment and tax motivated interest claims. Plaintiffs' claim is outlandish and provides no justification for continuing this litigation.

In *Henderson v. Shinseki*, —U.S.—, 131 S. Ct. 1197 (2011), the Supreme Court held that the 120-day period for filing a notice of appeal to the United States Court of Appeals for Veterans Claims set forth in 38 U.S.C. §7266(a) was not jurisdictional. Here, in contrast, plaintiffs seek to litigate untimely assessment and tax motivated interest claims under the TEFRA partnership provisions. Plaintiffs' claims are the same as those that the Federal Circuit addressed in *Keener v. U.S.*, 551 U.S. 1358 (Fed. Cir. 2009) and *Prati v. U.S.*, 603 F.3d 1301 (Fed. Cir. 2010), and held were barred by 26 U.S.C. §7422(h) from being litigated in a partner-level refund action. The Henderson case dealt with the unique Title 38 statutory system for veterans claims. That system has no bearing at all on the Title 26 TEFRA partnership scheme, including the jurisdictional bar against partner-level suits that are attributable to partnership items. It would be difficult to select two more divergent topics. Henderson simply has nothing to do with plaintiffs' case and does not affect the Federal Circuit's binding guidance to this Court.

Yet plaintiffs employ *Henderson* to continue their sustained attack on the Federal Circuit, assigning error no less than seven times in their short brief (e.g. "the Federal Circuit's failure" (doc. #65 at pp. 2, 3 , 4), "the Federal Circuit never determined" (p.3), "the Federal Circuit conflated merits and jurisdiction" (p.4), "But the Federal Circuit . . . failed . . . and . . . conflated. . . ." (p.6), and "the Federal Circuit's 'drive-by jurisdictional ruling' in Prati" (p.6)). In sum, the "notice" is a continuation of plaintiffs' (increasingly) strained arguments that invite this Court to defy binding precedent. As we have explained, and the "notice" confirms, there is no basis for further litigation and the Court should dismiss all remaining untimely assessment and tax motivated interest claims.

Respectfully submitted,

3/16/2011
Date

s/Bart D. Jeffress

BART D. JEFFRESS
Attorney of Record
U.S. Department of Justice,
ax Division
Court of Federal Claims Section
Post Office Box 26,
Ben Franklin Post Office
Washington, D.C. 20044
(202) 307-6496
(202) 514-9440 (fax)

JOHN A. DiCICCO
Principal Deputy
Assistant Attorney General
STEVEN I. FRAHM
Chief, Court of Federal Claims
Section

3/16/2011
Date

s/Steven I. Frahm
Of Counsel

Attorneys for Defendant

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

No. 04-683 T

(Judge Marian Blank Horn)

(Consolidated with Nos. 05-695 T,
05-696 T, 05-1315 T, 05-1384 T, & 09-205 T)

JOHN E. KETTLE and ANNE R. KETTLE,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

JOINT STATUS REPORT

Pursuant to the Court's Order (doc. #52) filed on April 20, 2010, the parties provide the following quarterly joint status report.

Pending before the Court are six AMCOR cases, which divide into two groups. Group I has three cases: (1) *Kettle*, Fed. Cl. No. 04-683 T; (2) *Weidemann*, Fed. Cl. No. 05-1384 T; and (3) *Ivy*, Fed. Cl. No. 09-205 T. . . .

The fundamental substance of the parties' positions set forth in the Group I Report has not changed since January 18, 2011, when the parties filed a joint status report (doc. #60) . . . . Since filing the January 18 report, plaintiffs' counsel and defendant have filed multiple related JSRs in other AMCOR cases. In addition, with respect to the Group I cases, there have been the following developments: (1) plaintiffs moved to transfer the Group I cases to Judge Lettow, defendant opposed, and plaintiffs replied (*see* doc. ## 61, 63, 64); and (2) plaintiffs filed a first notice of additional authority to which defendant responded (*see* doc. ## 65, 67), and plaintiffs recently filed a second notice of additional authority (doc. #69) and a third notice of additional authority (doc. #70) (to both of which defendant does not believe a response is necessary). Accordingly, the parties provide this updated, stand-alone JSR.

I. Group I Report

The Court's Group I cases, *Kettle*, *Weidemann*, and *Ivy*, have two types of claims: (1) period of limitation (also referred to by the parties as untimely assessment claims); and (2) tax motivated interest. . . .

. . . .

B. Plaintiffs' Statement:

The Group I cases (*Kettle*, *Ivy*, and *Weidemann*) are three of 36 AMCOR-related suits

currently pending before multiple judges of this Court that involve the partners' individual §6501(a)-based limitations claims and §6621(c) penalty interest claims. . . . As discussed below, the partners in each of the 36 cases assert that their limitations and penalty interest claims, as applicable, . . . have jurisdictional issues that are ultimately controlled by the Supreme Court's recent holdings in *Henderson*;[5] issues that this Court must determine before the common limitations and penalty interest claims can be resolved.

To promote judicial efficiency and the efficient administration of justice, plaintiffs in the two suits before Judge Lettow have requested that their cases be consolidated for a single resolution of all common and partner-specific issues, if any.[6] To avoid conflicting opinions and 2-36 duplicative appeals of the same issues, plaintiffs in each of the other 34 cases, including the three Group I cases here, have requested that their suits be transferred to Judge Lettow for consolidation. (doc. #61). The government opposes any attempt to transfer or consolidate and instead requests that this Court

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[5] *Henderson v. Shinseki*, 131 S.Ct. 1197, 2011 WL 691592 (U.S., March 1, 2011).

[6] See doc. #22 filed February 25, 2011, in *Epps* (Fed.Cl. 06-615) and doc. #16 filed February 24, 2011 in *McCann* (Fed.Cl. 06-216).

sua sponte dismiss all relevant limitations and penalty interest claims without requiring that the government file appropriate motions.

. . . .

3. Plaintiffs' Group I Claims are Controlled by *Jade Trading* and *Henderson*, Not *Prati*

. . . .

On March 1, 2011, the Supreme Court issued *Henderson*. As relevant here, *Henderson* addresses two issues. The first applies to the Group I plaintiffs' limitations claims. The second applies to both their limitations and also penalty interest claims. First, *Henderson* articulates four factors courts must apply to determine whether a provision within a complex procedural framework has "jurisdictional consequences" or is merely a "claim-processing rule" that can be equitably ignored. Second, *Henderson* extends the Supreme Court's general analysis in *Arbaugh*[36] (addressing the conflation of jurisdiction and merits before Article III courts) to Article I courts.

As to their limitations claims, *Henderson* has now established four factors that determine

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[36] *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), relying on *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83 (1998).

whether a provision has "jurisdictional consequences" or is merely a "claim-processing rule" that courts may ignore under equitable principles:[37]

(1) Do the provision's terms evidence that it was meant to carry jurisdictional consequences?

(2) Does Congress' placement of the provision within the relevant procedural framework indicate it was intended to be jurisdictional?

(3) Is there a separate jurisdictional provision within the relevant procedural framework?

(4) Does holding a provision to be jurisdictional support or conflict with the relevant procedural framework?

Section 6226(c) is the only provision granting personal jurisdiction over partners in partnership-level suits. For pre-1997 tax years, §6226(d)(1)(B) plainly states that §6226(c) "shall not apply" to partners after the date their assessment deadline expires. Pre-1997 §6226(d)(1)(B) bars the participation of any partner whose assessment deadline has expired, regardless of whether that

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[37] *Henderson*, slip op. 8-12.

deadline is classified as a partnership item, a nonpartnership item, or an affected item.

Applying the *Henderson* factors here makes clear that pre-1997 §6226(d)(1)(B) is jurisdictional and may not be ignored. In *Prati* and *Keener*, the Federal Circuit never determined that those partners' assessment deadlines had not expired before the partnership-level suits were filed. Rather, without addressing the jurisdictional consequences of §6226(d)(1)(B) for the pre-1997 tax years in issue, it held that those partners were required to have raised their limitations claims in the partnership-level suits. The Federal Circuit's failure in *Prati*, and also *Keener*, to address the jurisdictional consequences of pre-1997 §6226(d)(1)(B) cannot stand in light of the Supreme Court's holding in *Henderson*.[38] Therefore, summary dismissal of the Group I plaintiffs' cases is inappropriate and this Court must determine, *inter alia*, the proper application of the *Henderson* factors to pre-1997 §6226(d)(1)(B) for purposes of their limitations claims.

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[38] On March 8, 2011, a petition for writs of certiorari was filed with the Supreme Court addressing *Henderson*'s application to pre-1997 §6226(d)(1)(B) for 53 appeals in which the Federal Circuit summarily affirmed dismissals based on *Prati*. (*Keefe, et al. v. United States* S.Ct. 10-1105).

The Group I plaintiffs also assert, *inter alia*, that *Prati* cannot control either their limitations claims or their penalty interest claims because, *inter alia*, in *Prati* the Federal Circuit conflated merits and jurisdiction as to both issues. This conflation was a direct result of the Federal Circuit's failure to apply its prior precedent in *Jade Trading* as to the proper classification of and jurisdiction to determine affected items.

In *Steel*[39] the Supreme Court recognized and rejected the so-called "doctrine of hypothetical jurisdiction" which the Ninth Circuit had characterized as " 'assuming' jurisdiction for the purpose of deciding the merits."[40] In *Arbaugh*, the Supreme Court relied on *Steel* and *Da Silva*[41] in recognizing that opinions based on the conflation of merits and jurisdiction have no precedential value:

> Judicial opinions . . . "often obscure the issue by stating that the court is dismissing 'for lack of jurisdiction' when some threshold fact has not been

---

[39] *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 91 (1998).

[40] *Steel*, 523 U.S. at 94, quoting *United States v. Troescher*, 99 F.3d 933, 934, n. 1 (9th Cir. 1996).

[41] *Da Silva v. Kinsho International Corp.*, 229 F.3d 358 (2nd Cir. 2000).

> established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim." *Da Silva*, 229 F.3d, at 361. We have described such unrefined dispositions as "drive-by jurisdictional rulings" that should be accorded "no precedential effect" on the question whether the federal court had authority to adjudicate the claim in suit. *Steel Co.*, 523 U.S., at 91, 118 S.Ct. 1003.[42]

Attempting to end the use of merits determinations as "drive-by jurisdictional rulings," the Supreme Court in *Arbaugh* established the intent of Congress as a "readily administrable bright line" test to determine a provision's jurisdictional consequences.[43] But the "drive-by jurisdictional rulings" continued.

Steel and *Arbaugh* addressed purported jurisdictional determinations by Article III courts. *Henderson* has now established that *Arbaugh*'s "readily administrable bright line" test also applies to jurisdictional determinations by Article I courts.[44] The Supreme Court then specifically

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[42] *Arbaugh*, 546 U.S. at 1242-43.

[43] *Arbaugh*, 546 U.S. at 1245.

[44] *Henderson*, slip op. 6.

articulated the four factors listed above that courts must apply to determine when a provision is jurisdictional.

In *Henderson*, the Supreme Court held that the 38 U.S.C. §7266(a) deadline to appeal to the Article I Veterans Court is not jurisdictional.[45] Here, the issue is where and when, within TEFRA's procedural scheme, plaintiffs are allowed/required to raise their §6501(a)-based limitations claims and §6621(c) penalty interest claims. The options are either in the partnership-level suit before the Tax Court (an Article I court), or in this partner-level refund suit (before this Article I court).

In *Prati*, the Federal Circuit held that both claims could be raised only in the partnership-level Tax Court suits.[46] But the Federal Circuit:

(i) as to limitations, failed to address the existence, plain language, and purpose of §6226(d)(1)(B)'s jurisdictional bar for pre-TEFRA tax years and;

(ii) as to both issues, conflated

(a) §7422(h) (no jurisdiction over the claim where refund is attributable to partnership items) and

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[45] *Henderson*, slip op. 12.

[46] *Prati*, 1307-08 and n.4.

(b) §6221 (no jurisdiction to determine the merits of partnership-item elements where refund is attributable to affected items, but jurisdiction does exist to determine the nonpartnership-item elements and the affected item itself by applying any partnership-item elements previously determined in any partnership-item proceeding binding on that partner).[47]

Therefore, under *Henderson*, the Federal Circuit's "drive-by jurisdictional ruling" in *Prati* should be accorded no precedential effect on the question of whether this court has authority to adjudicate plaintiffs' claims.

The government argues that *Henderson* applies only to veterans claims and is, therefore, irrelevant to the jurisdictional issues presented in this tax refund suit. The Supreme Court disagrees. On March 7, 2011, the Supreme Court remanded *U.S. v. Mann*, 373 Fed.Appx. 350, 2010 WL 1418308 (4th Cir. 2010), a criminal case, to the Fourth Circuit "for further consideration in light of *Henderson* . . .", evidencing that the Supreme Court does not consider *Henderson* to be restricted only to veterans cases. By remanding *Mann*, the

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[47] *Jade Trading, LLC v. United States*, 598 F.3d 1372, 1378-79 (Fed.Cir. 2010).

Supreme Court made clear that the *Henderson* requirements apply to determine the jurisdictional consequences of *any* statute within *any* complex procedural framework.

On March 14, 2011, the Tenth Circuit issued *Springer*,[48] recognizing that the Supreme Court's *Henderson* analysis applies to determine the jurisdictional consequences of tax statutes in Tax Court suits. Specifically, the Tenth Circuit recognized

> Like the Veterans Court, the Tax Court is also an Article I court. However, the Congressional scheme defining the Tax Court's jurisdiction is significantly different from "the unique administrative scheme" for veterans-benefit review and the Veterans Court's place in it, as described in *Henderson*. *See Henderson*, 2011 WL 691592, at *7. Most significantly, the terms of 26 U.S.C. §6330(d)(1) clearly refer to the Tax Court's jurisdiction. *Cf. Henderson*, 2011 WL 691592, at *8 (noting first, among several factors, that statute

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[48] *Springer v. Commissioner*, 2011 WL 899718 (10th Cir. March 14, 2011) (unpublished). As the Tenth Circuit noted, its unpublished opinion is "not binding precedent" in any other case but "may be cited . . . for its persuasive value consistent with Fed.R.App.P. 32.1 and 10th Cir.R. 32.1." *Id.*, at fn*.

> allowing Veterans Court's review of benefits decision "do[es] not suggest, much less provide clear evidence, that the provision was meant to carry jurisdictional consequences"). Under the Supreme Court's analysis in *Henderson*, the requirements for an appeal to the Tax Court under 26 U.S.C. §6330(d)(1) are jurisdictional.

Springer, slip op. p. 4 n. 1. See the copy attached.

The Tenth Circuit acknowledged that the administrative and procedural schemes for veterans' claims before the Veterans Court and for taxpayer claims before the Tax Court are distinctly different, but that the factors articulated by the Supreme Court in *Henderson* do apply to determine the jurisdictional consequences of *any* statute within *any* complex procedural framework, the analytical approach the Group I plaintiffs advocate here.

In this case, the *Henderson* factors/requirements apply to the jurisdictional consequences of both (i) 26 U.S.C. §6226(d)(1)(B), and (ii) the conflation of §6221 and §7422(h), within TEFRA's procedural framework to resolve partnership-related tax issues for pre-1997 tax years. When those factors are applied here it is clear that:

- for pre-1997 tax years, under a *Henderson* analysis, §6226(d)(1)(B) is jurisdictional – just as the Tenth Circuit held that 26 U.S.C. §6330(d)(1) is jurisdictional – and, therefore, pre-1997 §6226(d)(1)(B) barred partners with expired assessment deadlines from participating in partnership-level Tax Court suits; and

- the jurisdictional conflation of §§6221 and 7422(h) cannot bar all affected item claims from this Court's existing refund jurisdiction under 28 U.S.C. §§1340, 1346(a)(1), and 1491(a)(1).

. . . .

C. Defendant's Statement:

. . . .

2. Defendant will seek sanctions for any further litigation of plaintiffs' untimely assessment and tax motivated interest claims.

Because there is no basis for further litigation, any continued maintenance of period of limitation and tax motivated interest claims in the face of the Federal Circuit's decisions in *Keener* and *Prati* will prompt a motion by defendant for all sanctions permitted by law, including sanctions under RCFC 11(b)(2), (c) (for pressing unwarranted and frivolous legal claims) and payment by plaintiffs'

counsel of excess costs, expenses, and attorneys' fees under 28 U.S.C. §1927 ("Any attorney . . . admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexastiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."). *See e.g. Phonometrics, Inc. v. Westin Hotel Co.*, 350 F.3d 1242 (Fed. Cir. 2003) (applying Eleventh Circuit law and affirming trial court's award under 28 U.S.C. §1927 for litigant's continued maintenance of infringement claims after a decision by the Federal Circuit in a related case precluded litigant from prevailing on its claims).

3. Response to Plaintiffs' Statement.

. . . .

a. There is no reason to transfer the Group I cases.

. . . .

Finally with regard to plaintiffs' motions to transfer, we filed a response (doc. #67) to plaintiffs' "notice of recent authority," explaining that the Supreme Court's decision in *Henderson v. Shinseki*, —U.S.—, 131 S. Ct. 1197 (2011) about a deadline for veterans' appeals simply has nothing to do with the Group I plaintiffs' claims and does not affect the Federal Circuit's binding guidance to

this Court. Defendant does not believe a response is necessary to plaintiffs' recently filed second notice (doc. #69) and third notice (doc. #70) but will provide one if the Court believes it would be helpful.

. . . .

Defendant's attorney has authorized plaintiffs' attorney to sign this joint status report on his behalf.

Respectfully submitted,

4/01/2011 — s/Thomas E. Redding
Date — THOMAS E. REDDING
Redding & Associates, P.C.
P.O. Box 924328
Houston, Texas 77292-4328
(713) 965-9244
(713) 621-5227 (fax)

Attorney for Plaintiffs

s/Bart D. Jeffress
4/01/2011 — by s/Thomas E. Redding
Date — BART D. JEFFRESS
Attorney of Record
U.S. Department of Justice
Tax Division
Court of Federal Claims Section
Post Office Box 26

Ben Franklin Post Office
Washington, D.C. 20044
(202) 307-6496
(202) 514-9440 (fax)

JOHN A. DiCICCO
Principal Deputy
Assistant Attorney General
STEVEN I. FRAHM
Chief, Court of Federal
Claims Section

s/Steven I. Frahm
4/01/2011 by s/Thomas E. Redding
Date Of Counsel

Attorneys for Defendant